Supreme Court of the United States.

October Term, 1898.

No. 216.

THE UNITED STATES, Appellant,

vs.

JOHN KRALL.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLEE.

The facts in this case are undisputed, having been stipulated in the trial of the case in the Court below. (Transcript, p. 12.) The United States was and is the owner of the military reservation referred to, as also the unsurveyed public land at a point on which appellee diverts water from said Cottonwood Creek for purposes of irrigation. The military reservation was set aside by executive order dated April 9th, 1873. Appellee appropriated the waters of Cottonwood Creek above the military reservation in the year 1877 and diverted them through a ditch to his lands, where they have since been used for the purpose of irrigation.

Appellant contends, on behalf of the government,

that appellee acquired no rights, as against the United States, by his appropriation and diversion of the water in 1877 and the continued use thereof for the purpose of irrigation since that time, but maintains that the United States, being the sovereign proprietor of the lands embraced in the reservation, and of the water flowing through the same, is entitled to have said water flow in its natural channel "undiminished in quantity and unimpaired in quality." In other words, appellant asserts what is commonly known as the doctrine of riparian rights with respect to its reservation Appellee denies that such doctrine, or rule of law, applies to said lands and asserts his right to the use of the waters of said stream as a prior appropriator under the laws of the State and Territory of Idaho as well as the laws of the United States. Happily all other questions of law and fact are eliminated from said case.

In behalf of appellee it is contended:

1st. That the local laws, customs and regulations, from the organization of the Territory of Idaho until the present time, have recognized, encouraged and permitted the appropriation and diversion of water from its natural course for the purpose of the irrigation and reclamation of arid lands; and that the so-called doctrine of riparian rights, so far as the same is in conflict with this rule, has never been recognized.

Black's Pomeroy on Water Rights, Sec. 15, *et seq.*

Drake vs. Earhart, 2d Idaho, 720-722.

2d. The right of appropriation of the waters of the arid regions, for the purposes of irrigation, has been recognized and confirmed by the courts of all the States and Territories embraced within that area, both State and Federal, and by the Supreme Court of the United States, as well as by the acts of Congress. This course was forced upon the courts and on Congress from the very necessities of the situation, for without the adoption of such a rule the arid areas were not capable of settlement and cultivation.

Black's Pomeroy on Water Rights, Secs. 15, 16, 17 and 120.

Kinney on Irrigation, Secs. 96-111.

Gould on Waters (1883), Sec. 228.

Bear River, etc., Mining Co. vs. New York Mining Co., 8 Calif., 327.

Broder vs. Natoma Water Co., 101 U. S., 274.

Basey vs. Gallagher, 20 Wall., 670.

Atchison vs. Peterson, 20 Wall., 507.

Jennison vs. Kirk, 98 U. S., 460.

Act of July 26, 1866, R. S. U. S., Sec. 2339, 14 Stat. at Large, U. S., 253.

Act of July 9, 1870, 16 Stat. at Large, 218, R. S. U. S., Sec. 2340.

3d. Appellee's rights to the waters of Cottonwood Creek attached in 1877, when he made his water filing and appropriation, subject only to the prior right, by appropriation, of a limited amount

made by the United States for irrigating a small portion of the reservation.

Drake vs. Earhart, 2 Idaho, 720-721.

Black's Pomeroy on Water Rights, Sec. 55.

Becker vs. Marble Creek Irrigation Co., 15 Utah, 225 (49 Pac., 892).

Low vs. Schaffer et al., 33 Pac. Rep., 678 (Calif).

Saint vs. Guerrerio, 30 Pac. Rep., 335 (Colo. Sup).

Union Mill Co. vs. Dangberg, 81 Fed. Rep., 73.

4th. Appellee concedes that the United States, being the sovereign owner of the lands embraced in the military reservation as well as the waters naturally flowing through the same, had a right to restrain and prevent the diversion of said waters from their natural course; but the appellee contends that this right of a sovereign riparian proprietor has been waived, surrendered and abandoned by the United States.

Propositions one, two and three involve questions largely elementary, but they are stated for the reason that they lie at the foundation upon which the title of the appellee rests.

Proposition No. 4 is the gist of this action and involves the essentials upon which this case rests. If appellee is right in his statement of it, the decision of the Circuit Court of Appeals must necessarily be affirmed. The question involved is one of momentous concern to the people of the entire arid

region of America. If the position taken by the government is sustained, it means that the old doctrine of riparian rights is affirmed in a section of the country where it is not applicable. Some of the cases in the State and Federal courts where this question has been discussed will now be referred to.

On the 26th day of July, 1866, an act was passed by Congress suspending the old doctrine of riparian proprietorship, so far as the United States was concerned, in its public lands, the ninth section of said act was as follows:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

14 Stat. at Large, 253, R. S. U. S., Secs. 2339-2340.

In Jennison vs. Kirk, 98 U. S., 456, Mr. Justice Field, speaking for the Court, said:

"Here, also, the first appropriator of water to be conveyed to such localities for mining or other ben-

eficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed."

Justice Field, in giving the reason for the passage of the act of July 26th, 1866, in said decision further said:

"Whilst acknowledging the general wisdom of

the regulations of miners, as sanctioned by the State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canels to carry water for those purposes 'is acknowledged and confirmed,' can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws and decisions of the courts, the owners and possessors should be protected in them; and that the right of

way for ditches and canals incident to such water-rights, being recognized in the same manner, should be 'acknowledged and confirmed.'"

In Broder vs. Water Co., 101 U. S., 274, the Court, speaking by Mr. Justice Miller of the same section, said:

"It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866 and that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."

And in that case it was held that rights acquired by appropriation before the passage of the act were protected as against one who obtained title of the land from the government after its passage.

It has also been held that where rights to water were acquired by appropriation after the passage of the act of 1866, they were valid and must be protected against one who subsequently obtained title to the land from the government.

De Necochea vs. Curtis, 20 Pac. Rep., 563.

Citing—

Osgood vs. Mining Co., 56 Cal., 571.

Farley vs. Land Co., 58 Cal., 142.
Himes vs. Johnson, 61 Cal., 259.
Judkins vs. Elliott, 12 Pac. Rep., 116.
Ware vs. Walker, 70 Cal., 591 (12 Pac. Rep., 475).

In the case of Bear Lake and River Waterworks and Irrigation Co. vs. Garland, decided October 19, 1896, 17 Sup. Ct. Rep., 12, Mr. Justice Peckham, speaking for the Court and referring to this statute, says:

"So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued, which are recognized and acknowledged by the local customs, laws and decisions of courts, such rights are acknowledged and confirmed."

Professor Pomeroy, in his work on Water Rights (1893), Sec. 17, referring to this statute, says:

"The right of property thus settled by State courts availed against all persons except the United States government. This limitation was soon removed. The United States government recognized the right to water on the public domain, thus acquired by prior appropriation, as a substantial and valid right which the government was bound to acknowledge and protect; and it repeatedly approved and adopted the doctrine which had sprung from

the mining customs and been settled by the State and Territorial decisions. Citing Broder vs. Natoma Water Co., 101 U. S., 274; Basey vs. Gallagher, 20 Wall., 670; Atchison vs. Peterson, *Id.*, 507. This view was expressly confirmed by a statute of Congress passed July 26, 1866. (R. S. U. S., Sec. 2339.) * * * * This statute, it is held by the United States Supreme Court, does not create the right; but it is 'rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. Citing Broder vs. Natoma Water Co., *supra.*"

In Atchison vs. Peterson, 20 Wall., 507, a Montana case, Mr. Justice Field said:

"By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadaquate to their protection. By the common law the riparian owner on a stream, not navigable, takes the land to the center of the stream, and such owner

has the right to the use of the water flowing over the land as an incident to his estate."

* * * * * * * * * * * * * *

"This equality of right (at the common law) among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of those streams.

"The government, by its silent acquiescene, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated, and open to general exploration, does in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

He quotes from some of the early California decisions hereinbefore cited, and further says:

"This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. (Quoting the statute of Congress.). The

right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made."

In the case of Basey vs. Gallagher, 20 Wall., 671, the same doctrine was applied by the United States Supreme Court to all other beneficial purposes for which water is essential, as well as to mining. Mr Justice Field, after quoting the decision in Atchison vs. Peterson, said:

"The views there expressed and the rulings made are equally applicable to the use of water on the public land for purposes of irrigation. No distinction is made in those States and Territories by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

He quotes an early California decision to this effect (Tartar vs. Spring V. M. Co., 5 Cal., 397), and proceeds:

"Ever since that decision it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection."

Continuing, he said:

"The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes as well as for mining. * * * It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the

use of water, which had grown up among the occupants of the public land under the peculiar necessities of their condition."

Professor Pomeroy, in his work above referred to, Sec. 25, after a detailed reference to this decision of the United States Supreme Court and of the various State courts on this question, concludes as follows:

"Where a stream or lake was throughout its entire extent on the public land, the prior appropriator obtained a right, we have seen, good against all the world except the Federal Government. The government might have denied this right and treated it as non-existing. On the contrary, Congress formerly acknowledged it, and by the declaratory statute of 1866 made the national ownership of the public domain bordering on the stream or lake subject to the claims and uses of the prior appropriator."

In the case of Silver Peak Mines vs. Valcalda, 79 Fed. Rep., 890, Judge Hawley, referring to this statute, says:

"In so far as the laws of the United States had any application to this case, the plaintiff's right to the water of the springs, acquired under the local customs, laws and decisions of the courts, are recognized by the provisions of Section 2339 of the Revised Statutes."

This question has been repeatedly passed upon by the State courts, and in every instance where it has been raised on the Pacific Coast, the section of the country to which the act of 1866 was applicable and for which it was passed, the decisions have

been in accordance with the Federal decisions just quoted. In a very recent case, decided March 15, 1898, Carson vs. Gentner, 52 Pac. Rep., 507, the Supreme Court of Oregon, says:

"The doctrine of the common law, that the waters of a stream must continue to flow in its natural channel, undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are embedded, and also serves when used in irrigating arid tracts, to cause the desert to bud, blossom, and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive law-givers to adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue the use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common

law; and the legislative assemblies of these States, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diversion of water against all claimants except the sovereign."

After referring to the act of 1866, the Court says:

"It has been repeatedly held that the provisions of the section just quoted only confirm to the owners of ditches and water-rights on the public domain the same privileges which they enjoyed under the local customs, laws, and decisions of the courts prior to its pasage. Citing Atchison vs. Peterson, 20 Wall., 507; Basey vs. Gallagher, 20 Wall., 670; Jennison vs. Kirk, 98 U. S., 453; Broder vs. Water Co., 101 U. S., 274."

The Oregon Court quotes approvingly the very cogent reasoning of Mr. Justice Ross in his dissenting opinion in the case of Lux vs. Haggin (69 Cal., 255), as follows:

"No valid reason exists why the government, which owned both the land and the water could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the State, and of the legislaton and decisions with respect to the subject, is it possible that either government, State or National, ever contemplated that a conveyance of 40 acres of land at the lower end of a stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream

upon the public lands above, and entitle the grantee of the 40 acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated."

The Oregon case above referred to quotes the decision of the Circuit Court of Appeals in the case at bar approvingly, and sustains the position taken by a majority of the Court in this case.

In the case of De Necochea vs. Curtis (Cal.), 22 Pac. Rep., 199, referring to a recognition of this right on the part of the Federal Government, it is said:

"In the absence of such adverse claim his right is perfect, for the owner of the soil—the United States—has recognized and confirmed it, and has declared that all subsequent purchasers must take subject to it."

To the same effect are Jacob vs. Lorenz, 33 Pac. Rep., 119 (Cal.); Isaacs vs. Barber, 38 Pac Rep., 873 (Wash.).

In the case of Williams vs. Harter, decided May 31, 1898, 53 Pac. Rep., 407, the Supreme Court of California, says:

"All public lands are open to occupation and settlement by citizens of the United States, and the law is settled that the water flowing from springs on public lands may be diverted to other public lands, and there used for irrgation or other necessary purposes, and a right to the same acquired as against any one who subsequently obtains title to the land on which the springs are situated. Citing De Necochea vs. Curtis, 80 Cal., 397 (20 Pac.,

563); Ely vs. Ferguson, 91 Cal., 187 (27 Pac, 587)."

In the opinion of the trial Court (see Transcript, page 22) the learned Judge bases his decision on the case of Sturr vs. Beck, 133 U. S., 541, and Justice Gilbert, of the Circuit Court of Appeals, in his dissenting opinion (Transcript, page 31), likewise bases his conclusions on the same case.

The trial Judge makes no reference to the act of 1866, and Justice Gilbert, in referring to it, says:

"But there is nothing in the statute, nor in any decision of the courts construing the same, to uphold the doctrine that an appropriator of water upon the public lands of the United States may by virtue of such appropriation or the continued use of the water acquire rights therein adverse to the United States." (Transcript, pages 31-32.)

It must be apparent that the learned Judge has failed to correctly interpret the ninth Section of the Act of 1866, and of the decisions of the courts with reference to the same above referred to. The United States, being the sovereign owner of the military reservation in question, clearly had the right to exact that the waters flowing thereon should remain in their natural channel undiminished in quantity. This was an attribute of sovereign owenership in the soil, but it possessed the same attribute with respect to the public lands generally. It manifestly will not be seriously contended that the executive order of 1873, setting aside these lands as a military reservation, could in

any way change their *status* with respect to the act of 1866 regarding riparian ownership.

Congress alone can provide for the disposition of the public lands together with any incident thereto, such as the flow of natural streams thereon. Congress yielded and surrendered this riparian incident of sovereign proprietorship by the ninth Section of the Act of 1866. The executive order of 1873 could not restore this attribute, nor does it pretend to. It is absurd to contend that it could. This military reservation, therefore, occupied exactly the same *status* with respect to this question that all other public lands did. The appellee's rights to the use of this water attached in 1877. Congress had surrendered the right of riparian proprietorship to these lands by the act of 1866. The appellee, therefore, had the same right to appropriate the unappropriated waters of this stream as had any other citizen, or as had the government itself.

In the case of Sturr vs. Beck, relied on by the appellant, the appropriator entered upon the land of the grantor of the plaintiff, which had been previously filed upon under the land laws of the United States, and took the water thereon flowing, which the Court held was an incident to the entryman's land and which the appropriator could not take. The Supreme Court in that case manifestly did not intend to restore the doctrine of riparian rights and to nullify the doctrine of prior appropriation recognized by the act of 1866. This conclusion is apparent for the reason that the Court, in Sturr vs. Beck, refers to that statute and quotes approvingly

the cases of Atchison vs. Peterson, 20 Wall., 507; Broder vs. Water Co., 101 U. S., 274, and Basey vs. Gallagher, 20 Wall., 682. The rule laid down in all of these cases is plainly a recognition of the doctrine of prior appropriation as set forth in the act of 1866, and clearly in contravention of the doctrine of riparian rights. To sustain the opposite contention the court must, of necessity, have reversed the three cases just referred to.

Moreover, the case of Sturr vs. Beck went up from the Territory of Dakota, where the doctrine of prior appropriation was not in existence at that time, at least as it existed throughout the arid States and Territories of the west generally.

The Supreme Court of Utah, in the case of Stowell vs. Johnson (26 Pac. Rep., 291), refers to the case of Sturr vs. Beck, and clearly shows that it is not capable of the construction contended for by appellant, and that it grew out of local physical conditions and a peculiar statute of Dakota not found elsewhere throughout the arid States. We quote from this decision, as follows:

"Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory, it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For

at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The Legislature of this Territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it. So with Colorado, early in its history, by a decision of its highest court, it was set aside. Youker vs. Nichols, 1 Colo., 551. But defendants contended that their right to have water flow in Canfield Creek, as it was wont to when their grantors and predecessors in interest acquired title to the land, is a vested right, and is not a rightful subject of legislation. In this arid country, that must remain a desert without the use of water for irrigation, if anything is a rightful subject of legislation it is the ownership of the water, and use and appropriation of the waters of the running streams for irrigation and domestic use. In support of their contention, the defendants cite Sturr vs. Beck, 133 U. S., 541. That decison was made in an appeal from the Supreme Court of the Territory of Dakota, where the statutes and climatic conditions are very different from those in this Territory. The full force and pith of the opinion is found in its concluding paragraph: 'Thus under the laws of Congress and the Territory, and the applicable custom, priority of possession gives priority of right. The question is not as to the extent of Smith's interest in the homestead, as against the government, but whether as against Sturr, his lawful occupancy, under the settlement and entry, was not a prior appropriation which Sturr could not displace.' We have no doubt it was one of the statutes of Dakota upon which this decision was

made, and it is as follows: 'Sec. 255 (Civil Code). The owner of land owns water standing therein, and flowng over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.' How unlike this statute is, to the whole course of legislation in this Territory in reference to water-rights. Our views are supported by Pomeroy on Rip. Rights, Sec. 105."

In conclusion, appellee presents a proposition, which, so far as he has been able to learn, has not been passed upon by the Federal Courts.

He contends that the right of appropriation of the natural waters of the streams of this State and Territory has been recognized by the courts and the acts of the Legislature from the beginning, and that Congress, in admitting the State into the Union, ratified the laws and Constitution of the State recognizing the right of prior appropriation, thereby surrendering the government's rights as a riparian proprietor.

The Revised Statutes of Idaho applicable to this question, and which were in force prior to the adoption of the State Constitution, are as follows:

Sec. 3155. "The right to the use of running water flowing in a river, or stream, or down a canon or ravine, may be acquired by appropriation."

Sec. 3156. "The appropriation must be for some useful or beneficial purpose, and when the appro-

priator or his successor in interest ceases to use it for such a purpose, the right ceases."

Sec. 3159. "As between appropriators, the one first in time is the first in right."

Section 3160 specifies the manner in which this right of appropriation must be exercised, requiring certain formalities as to notice, etc., but the stipulations in this case make the recital of this unnecessary. (Transcript, p. 14.)

Section 3165, originally enacted in 1881, is as follows:

"All ditches, canals, and other works heretofore made, constructed, or provided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with, the requirements of this chapter."

We quote from Article 15 of the Constitution of the State respecting water rights:

Sec. 1. "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law."

Sec. 3. "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of

appropriation shall give the better right as between those using the water." * * *

Sec. 4. "Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with a view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law."

Section 1 of the Act admitting Idaho into the Union as a State, is as follows:

"That the State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby accepted, ratified, and confirmed."

The concluding section of said enabling act is as follows:

"And all laws in force made by said Territory, at the time of its admission into the Union, shall be

in force in said State, except as modified or changed by this act or by the Constitution of the State."

Act of July 3, 1890, Sup. R. S. U. S., Vol. 1, 765, 26 Stat., 215.

Appellee contends that the provisions of the admission act above quoted, accepted, ratified and confirmed the Constitution and laws of the State of Idaho then in force, and that said admission act specially provided that such Constitution and laws should remain in force. It must be manifestly apparent from the foregoing decisions that the Constitution and laws of the State of Idaho, as well as the laws of the Territory of Idaho, above quoted, and which were continued in force upon the admission of the State, had all recognized the right of appropriation of the natural waters of the State, and that the old doctrine of riparian rights was distinctly and clearly abrogated.

In the admission act above referred to, Congress made large donations of the public domain to the new State for educational and other purposes. As Congress has the exclusive right to dispose of the public domain, and as that right was specially exercised in the admission of this State, it must be apparent that Congress likewise had a right to yield and surrender any mere incident to the public domain, such as the right to have the waters of natural streams flow in their natural channels. In the admission act confirming and ratifying the laws and Constitution of the State, all of which abrogated the doctrine of riparian rights, the government of

necessity must have surrendered its riparian rights with respect to its public lands generally within this State, including the tract in question. This is the only conclusion which can be arrived at when we consider the plain provisions of the admission act.

For the foregoing reasons, the appellee asks that the decision of the Circuit Court of Appeals be affirmed and that the injunction heretofore issued in said case may be dissolved.

Respectfully submitted,

EDGAR WILSON,

Solicitor for Appellee.